Supreme Court, U.S.
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No. 95-858

In the Supreme Court of the United States

OCTOBER TERM, 1995

RONALD CHICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars petitioner's prosecution for 17 substantive counts of selling illegally modified electronics equipment and one count of conspiracy to "assemble, possess, and sell" illegally modified electronics equipment after the forfeiture of illegally modified equipment different from that forming the basis for the substantive counts.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 61 F.3d 682. The order of the district court denying petitioner's motion to dismiss (Pet. App. 17a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1995. A petition for rehearing was denied on August 31, 1995. Pet. App. 16a The petition for a writ of certiorari was filed on November 29, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the Western District of Washington returned an 18-count superseding indictment charging petitioner with conspiracy to sell illegally modified satellite descramblers, in violation of 18 U.S.C. 371, and 17 counts of selling illegally modified satellite descramblers, in violation of 18 U.S.C. 2512(1)(b). Before trial, petitioner moved to dismiss the indictment on the ground that the prosecution was barred by the Double Jeopardy Clause. The district court denied the motion, and petitioner took an interlocutory appeal. The court of appeals affirmed. Pet. App. 1a-15a.

1. On March 30, 1993, an FBI special agent obtained warrants to search petitioner's Seattle home and a storage locker that petitioner had rented. The affidavit in support of the application alleged that petitioner recently had illegally modified or sold illegally modified television "descrambler modules" that allowed users to receive cable and satellite television channels for which they had not paid. Gov't C.A. Br. 3. On April 1, 1993, federal law enforcement officers executing the warrant seized a variety of television and electronics equipment, including more than 50 satellite television descramblers. Pet. App. 2a.

2. On November 19, 1993, the government filed a civil complaint seeking forfeiture of some of the equipment seized from petitioner's residence. The complaint alleged that on March 19, 1993, a confidential informant had purchased an illegally modified cable descrambler from petitioner and that petitioner had given the informant 44 key codes necessary to obtain encrypted cable television programs.

Gov't C.A. Br. 4. Based on that incident, the complaint alleged that the seized equipment was used to intercept scrambled or encrypted satellite video communications, in violation of 18 U.S.C. 2511, and therefore was subject to forfeiture under 18 U.S.C. 2513. Pet. App. 2a-3a.

On August 30, 1994, petitioner and the government entered into a consent judgment to settle the forfeiture action. In the consent judgment, petitioner agreed to the forfeiture of 13 categories of equipment seized from his home "without further adjudication of any issue of fact or law." The forfeited equipment consisted primarily of various types of descramblers and descrambler modules. The government also agreed to return a substantial quantity of the seized electronics equipment, including tools, stereo equipment, televisions, remote controls, and some descramblers. Gov't C.A. Br. 4; Pet. App. 3a.

On July 26, 1994, petitioner and his sister, Renate Ann Chick, were charged with conspiracy to "assemble, possess, and sell" satellite descrambler modules that would allow the descrambling of satellite television programming without payment of subscription fees. Pet. App. 3a. The indictment further alleged, as overt acts in furtherance of the conspiracy and as individual counts, that petitioner had sold illegal descrambler units on 12 different occasions, in violation of 18 U.S.C. 2512(1)(b). Gov't C.A. Br. 5. On October 18, 1994, the grand jury returned a superseding indictment that added five more counts charging that petitioner had sold illegal descrambler units. Pet. App. 3a.

Petitioner moved to dismiss the indictment, alleging that the prior civil forfeiture of some of the equipment seized from his home had punished him for

the conduct charged in the indictment and thus that his conviction on the indictment would constitute a second punishment for the same offense, in violation of the Double Jeopardy Clause. The district court denied the motion. Pet. App. 17a-20a. The court assumed without deciding that the prior civil forfeiture constituted punishment for purposes of the Double Jeopardy Clause. It held, however, that the criminal prosecution did not seek to punish petitioner for the "same offense" as the civil forfeiture. *Id.* at 18a-19a. According to the district court, the civil forfeiture rested on petitioner's possession of certain illegal descrambling devices. By contrast, the district court held, the indictment alleged that petitioner had sold different illegal descrambling devices. *Id.* at 19a. The court also found that the conspiracy charged in the indictment was a different offense from the forfeiture based on petitioner's possession of the devices. *Id.* at 18a.

4. Petitioner took an interlocutory appeal, and the court of appeals affirmed. Pet. App. 1a-15a. The court first found that it had jurisdiction over petitioner's appeal. *Id.* at 4a-8a. Citing *Abney* v. *United States*, 431 U.S. 651 (1977), the court held that the district court's order denying petitioner's motion to dismiss was an immediately appealable collateral order. The court acknowledged that "[t]he constitutional right directly involved in *Abney* was the right to avoid a second trial" and that petitioner's "claimed right is the right to avoid a second punishment." Pet. App. 6a-7a. It held, however, that petitioner could bring an immediate appeal because "if the defendant is convicted, and punishment imposed, then the constitutional right not to be doubly punished is lost, even if vindicated on appeal." *Id.* at 7a.

On the merits, the court of appeals held that forfeiture under 18 U.S.C. 2513, the statute under which the government had sought forfeiture of the seized equipment, constituted punishment for purposes of the Double Jeopardy Clause. The court held, however, that the civil forfeiture did not impose punishment for the "same offense" as any of those charged in the indictment against petitioner. The court noted that the civil forfeiture rested on allegations that petitioner used the forfeited equipment "to intercept electronic communications in violation of 18 U.S.C. § 2511." Pet. App. 12a. By contrast, the indictment charged that petitioner had conspired to "assemble, possess, or sell" satellite descrambler equipment and that petitioner had sold illegally modified descramblers on specific occasions. Applying the test set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), the court held that "the counts contained in the superceding indictment were based on distinctly different offenses from the offense which underlies the civil forfeiture action." Pet. App. 12a-13a.

The court also held that the conspiracy charged in the indictment was a separate offense from the civil forfeiture "offense" because "the offense of conspiracy requires proof of at least two facts which the forfeiture action did not i.e., (1) proof of an agreement to commit the substantive offense; and (2) proof of participation by the defendant." Pet. App. 14a. Finally, the court relied on this Court's decision in *United States* v. *Felix*, 503 U.S. 378, 389 (1992), which held that "a substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." On the basis of that holding, the court of appeals held that "the Double Jeop-

ardy Clause would not be violated by the forfeiture of electronic equipment used by [petitioner] to intercept electronic communications in violation of 18 U.S.C. § 2511 and then a subsequent prosecution of [petitioner] for conspiring to use the same equipment for the same illegal purposes." Pet. App. 14a-15a.

ARGUMENT

Petitioner raises two challenges to the court of appeals' rejection of his double jeopardy claim. First, he contends (Pet. 13-22) that the court erred because it applied the test set forth in *Blockburger* v. *United States*, 284 U.S. 299 (1932), to determine whether the civil forfeiture imposed punishment for the "same offenses" as those charged against him in the criminal indictment. Second, he asserts that the court of appeals erroneously concluded that the conspiracy charged in the indictment and the offenses underlying the conspiracy are not the "same offense" for double jeopardy purposes. Those claims do not warrant further review.

1. The Double Jeopardy Clause prohibits the imposition of multiple punishments for the same offense in separate proceedings. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court held that after imposition of a criminal punishment, the Clause's "multiple punishments" prohibition barred imposition of a civil penalty that is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 442. Subsequently, in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), the Court held that a forfeiture of certain property used to facilitate narcotics offenses, pursuant to 21 U.S.C.

881(a)(4) and (a)(7), is subject to review under the Excessive Fines Clause of the Eighth Amendment.

Relying on *Halper* and *Austin*, the Ninth Circuit has held that a civil forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) invariably constitutes punishment for purposes of the multiple punishments prong of the Double Jeopardy Clause. See *United States* v. *$405,089.23*, 33 F.3d 1210 (9th Cir. 1994), cert. granted, No. 95-346 (Jan. 12, 1996) (to be argued Apr. 17, 1996). But see *United States* v. *184,505.01*, 72 F.3d 1160 (3d Cir. 1995) (forfeiture of proceeds of drug trafficking is wholly remedial and accordingly does not inflict "punishment"); *United States* v. *Salinas*, 65 F.3d 551 (6th Cir. 1995) (same); *United States* v. *Tilley*, 18 F.3d 295 (5th Cir.) (same), cert. denied, 115 S. Ct. 573 (1994). The Fifth and Sixth Circuits have held that the forfeiture of property used to facilitate the commission of a drug crime, under 21 U.S.C. 881(a)(7), constitutes punishment for that crime. See *United States* v. *Perez*, 70 F.3d 345 (5th Cir. 1995); *United States* v. *Ursery*, 59 F.3d 568 (6th Cir. 1995), cert. granted, No. 95-345 (Jan. 12, 1996) (to be argued Apr. 17, 1996).

Petitioner's claim rests on the premise that the forfeiture of the satellite descrambler units seized from him likewise constitutes punishment for double jeopardy purposes. Even if correct, that claim is not properly before this Court, because the court of appeals lacked jurisdiction to consider it. In *Abney* v. *United States*, 431 U.S. 651 (1977), this Court held that a pretrial order rejecting a claim of former jeopardy may be raised by a defendant in an interlocutory appeal when it is premised on the right not to be "twice put to trial for the same offense." *Id.* at 661 (emphasis omitted). The Court suggested, however,

that a pure multiple punishments claim, such as petitioner raises, would not be similarly appealable, because "that aspect of the right can be fully vindicated on an appeal following final judgment." *Id.* at 660.

This Court's decision in *Witte* v. *United States*, 115 S. Ct. 2199 (1995), does not warrant a different result. In that case, the Court recognized that the Double Jeopardy Clause prohibits the government from "*attempting* a second time to punish criminally[] for the same offense." *Id.* at 2204 (emphasis partially omitted). *Witte*, however, presented no question of appellate jurisdiction, because the district court had dismissed the indictment on double jeopardy grounds, see *id.* at 2203-2204, and the court of appeals accordingly had jurisdiction over the government's appeal under 18 U.S.C. 3731. For that reason, the *Witte* Court addressed only whether the petitioner's claim was premature, not whether it was appealable. The fact that a double jeopardy claim may be ripe for adjudication by a district court (as is true of many other pretrial claims, including suppression claims) does not mean that a court's rejection of the claim is immediately appealable on an interlocutory basis. Because the right not to be subject to impermissible multiple punishments can be completely vindicated on appeal from a conviction and sentence, the court of appeals erred in asserting appellate jurisdiction over petitioner's interlocutory appeal.[1]

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[1] The courts of appeals are divided over this issue. Compare *United States* v. *Ramirez-Burgos*, 44 F.3d 17, 18-19 (1st Cir. 1995) (finding no right of interlocutory appeal for multiple punishments claim) with Pet. App. 4a-8a (finding right of appeal); *United States* v. *Perez*, 70 F.3d 345 (5th Cir. 1995)

2. In any event, petitioner's double jeopardy claims are without merit.

a. *Substantive counts.* Even if the statute under which petitioner's equipment was forfeited, 18 U.S.C. 2513, generally defined the "same offense" as the substantive offenses charged in the present indictment under 18 U.S.C. 2511, petitioner would not be entitled to relief. That is because, even if the same offense (or greater- and lesser-included offenses) supported both the forfeiture proceeding and the substantive criminal charges, petitioner committed that offense multiple times on separate occasions. There is no reason why he may not receive a separate punishment for each violation.

The government obtained the forfeiture of the seized equipment because that equipment had been "used, sent, carried, manufactured, assembled, possessed, sold, or advertised" in violation of 18 U.S.C. 2511. Thus, if the forfeiture constituted "punishment," it imposed punishment on petitioner for using, manufacturing, possessing, or selling the seized equipment in violation of Section 2511. The 17 substantive counts of the indictment, however, are not based on petitioner's use, manufacture, possession, or sale of the seized equipment. Instead, those counts charge him with the sale of illegal satellite descrambler modules between 1990 and March 19, 1993. Nothing in the record suggests, and petitioner does not claim, that any of the forfeited equipment was the same equipment that he is charged with illegally selling in Counts 2 through 18 of the indictment. Thus, if petitioner is convicted on Counts 2 through

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(same); *United States* v. *Baird*, 63 F.3d 1213 (3d Cir. 1995) (same), cert. denied, No. 95-630 (Feb. 20, 1996).

18, he will be punished for the individual sales that form the basis for those counts, not for the illegal use of different equipment that he forfeited to the government. Cf. *United States* v. *Felix*, 503 U.S. 378, 385 (1992) (offenses are distinct when they involve "no common conduct").

For the reasons given above, petitioner would not be assisted even if he were correct in contending (Pet. 14-22) that the court of appeals erred in employing the *Blockburger* "same elements" test to determine whether the prior civil forfeiture imposed punishment for the "same offenses" as those charged in the substantive counts of the criminal indictment. Nevertheless, petitioner's contention that the *Blockburger* test does not apply to multiple punishment cases is without merit. This Court has expressly held that the "same elements" test announced in *Blockburger* v. *United States* applies "[i]n both the multiple punishment and multiple prosecution contexts." *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993). In *Dixon*, moreover, the Court overruled *Grady* v. *Corbin*, 495 U.S. 508 (1990), which had construed the Double Jeopardy Clause to protect against successive uses of the "same conduct" in criminal prosecutions against a defendant.[2]

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[2] *United States* v. *Halper*, 490 U.S. 435 (1989), and *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), are not to the contrary. The only issue before the Court in *Halper* was whether, following a criminal conviction, "a civil penalty may constitute 'punishment' for the purposes of double jeopardy analysis." 490 U.S. at 436. Similarly, the Court in *Kurth Ranch* stated that "we ask only whether the tax [imposed following the criminal conviction in that case] has punitive characteristics that subject it to the constraints of the Double Jeopardy Clause." 114 S. Ct. at 1945. In both cases, the

b. *Conspiracy count.* Petitioner's challenge to the conspiracy count is equally unfounded. Petitioner acknowledges (Pet. 22-23) that in *Felix*, this Court held that "a substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." See *Felix*, 503 U.S. at 389. Accord *Garrett* v. *United States*, 471 U.S. 773, 778 (1985); *Iannelli* v. *United States*, 420 U.S. 770, 781-782 (1975); *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946). That rule is based on the fact that proof of a conspiracy requires proof of an agreement, while proof of a substantive offense does not. See, *e.g.*, *United States* v. *Bayer*, 331 U.S. 532 (1947). Thus, even if the government's proof at trial of the alleged conspiracy would include evidence of the conduct that led to the forfeiture, the conspiracy is a separate offense from the "offense" punished by the forfeiture.

Petitioner argues (Pet. 25) that the court of appeals' decision "stretches *Felix* too far by suggesting that punishment for a substantive crime and a later attempt to impose punishment for a conspiracy to commit that same crime will never lead to a double jeopardy violation." Nothing in *Felix* suggests that the Court intended to impose any limitations on its holding, however; to the contrary, the Court referred to the rule it stated in *Felix* as "established doctrine" and refused to limit its application by applying the "same conduct" test of *Grady* v. *Corbin*, 495 U.S. 508

Court therefore had no occasion to consider whether the "offenses" underlying the civil penalty or tax and that underlying the criminal prosecution were the same.

(1990), overruled by *United States* v. *Dixon*, 113 S. Ct. 2849 (1993).

Nor is there any merit to petitioner's assertion that the Court's decision in *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), casts doubt on the validity of *Felix*. In *Kurth Ranch*, the Court held that, following the criminal prosecution of the Kurths, a proceeding initiated to collect a tax on the "possession and storage" of illegal drugs "was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offence.'" *Id.* at 1948. The Court declined to address the claim that respondents who had been convicted only of conspiracy to commit the underlying drug offenses lacked standing to challenge the tax, because that claim had not been raised below. See *id.* at 1942 n.9. Accordingly, the Court had no occasion to consider the application of the *Felix* rule in *Kurth Ranch*.

3. There is no reason to hold this case pending the disposition of *United States* v. *Ursery*, No. 95-345, and *United States* v. *$405,089.23*, No. 95-346 (both cases to be argued Apr. 17, 1996). In *$405,089.23*, the Ninth Circuit held that civil judicial forfeiture of drug proceeds under 21 U.S.C. 881(a) invariably constitutes punishment under the Double Jeopardy Clause. In *Ursery*, the Sixth Circuit held the civil judicial forfeiture of property used to facilitate a drug crime under 21 U.S.C. 881(a)(7) always amounts to punishment for double jeopardy purposes.

The government's brief in those consolidated cases argues that civil forfeiture followed by criminal prosecution does not raise double jeopardy concerns, that the forfeitures at issue do not constitute punishment, that civil forfeiture and the criminal offense on

which it rests are never the "same offense" under the Double Jeopardy Clause, and that parallel civil forfeiture and criminal proceedings constitute a single proceeding for purposes of the multiple punishments prong of the Double Jeopardy Clause.

Although this Court's acceptance of the government's arguments in *Ursery* and *$405,089.23* would provide additional grounds on which to reject petitioner's claims, a decision favorable to the respondents in those cases would not provide petitioner with a ground for relief. As set forth above, petitioner cannot obtain dismissal of the substantive counts of the indictment under any view of the Double Jeopardy Clause. And a straightforward application of *Felix* is dispositive of petitioner's challenge to the conspiracy count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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